United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1014

To be argued by
ARLEN S. YALKUT

B P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

EDWIN GONZALEZ,

Appellant,

and

JULIO GONZALEZ and RAMON GONZALEZ,

Defendants.

Appeal From the United States District Court for the Eastern District of New York

BRIEF FOR APPELLANT

ARLEN S. YALKUT
Of Counsel
BLEIFER & YALKUT
Attorneys for Appellant
12 Spring Brook Road
Spring Valley, New York 10977
(914) 425-0300

(9264)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

TABLE OF CASES

QUESTIONS PRESENTED

1. Whether, under the circumstances, the trial court erred in refusing to permit the defendant to withdraw his guilty plea prior to sentence without affording the defendant a hearing?

2. Whether the sentencing court imposed upon the defendant a sentence which is excessive in view of the sentences imposed on other defendants for the same or similar offenses and in light of the defendant's own background?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1014

UNITED STATES OF AMERICA, : 75CR 625
76-1014

Appellee, :

-against- :

EDWIN GONZALEZ, :

Appellant. :

On Appeal From The United States District Court For The Eastern District of New York

---

BRIEF FOR THE APPELLANT

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Orrin G. Judd, Presiding), rendered on December 19, 1975, wherein the Appellant, EDWIN GONZALEZ, was convicted upon a plea of guilty of one count of possession of a controlled substance and one count of distribution of a controlled substance, to wit: cocaine hydrocloride in violation of 21 U.S.C. 841 (a)(1). The Appellant was sentenced to the care and custody of the Attorney General for four (4) years with a special parole term of five (5) years to commence upon expiration of the term of imprisonment.

The trial court has permitted the Appellant to be released on bail pending the determination of this appeal.

STATEMENT OF FACTS

A six-count indictment was filed charging the Appellant, EDWIN GONZALEZ, in Counts One and Two with possession and distribution of a controlled substance consisting of approximately 52.46 of cocaine hydrocloride on March 21, 1975. The Third and Fourth counts charge the Appellant with possession and distribution of a controlled substance consisting of 26.98 grams of cocaine hydrochloride.

The Fifth and Sixth do not relate to the Appellant, but do involve Ramon Gonzalez who was also charged in connection with the other counts in the indictment.

(A) MOTION TO WITHDRAW GUILTY PLEA

On October 30, 1975, after selection of a jury and after one day of testimony at trial, all three defendants, including appellant, were permitted to plead guilty to various counts of the indictment in satisfaction of the entire indictment. The Appellant plead guilty to Counts One and Two of the indictment.

Although the Assistant United States Attorney prosecuting the case did not insist that the Appellant plead guilty, he did insist that none of the three defendants, all of whom are brothers, could plead guilty to anything less than the entire indictment unless all three plead guilty to one or more counts of the indictment.

At the beginning of the Rule 11 questioning, the Appellant expressed difficulty in understanding the Court's questions. (Page 9 of plea minutes.) The Appellant was, thereupon, provided

with an official court interpreter. When asked by the Court as to his educational background, the Appellant responded that he "never went to school."[1].

The trial court explained to the Appellant the maximum penalties which he faced if he offered to plead guilty. In response to questioning by the trial court, the Appellant stated, in Spanish:

"I better plead guilty. If I let myself go at the trial maybe they find me guilty, maybe they will give me such a long time, and I have four children."[2].(emphasis added)

The Appellant was then asked whether he sold two ounces of cocaine to Mr. Blackburn (a government agent) in March, 1975. He responded affirmatively. The Appellant, unlike Ramon Gonzalez whose plea had been accepted minutes before,[3]. was not asked whether he possessed the narcotics, an essential element of the charge under Count One of the indictment.

The trial court then directed the preparation of a presentence report prior to setting a date for sentencing.

The third defendant, Julio Gonzalez, was the last to plead guilty and the trial court was extremely reluctant to accept his plea because of his professed innocence. Nevertheless, Julio Gonzalez' plea of guilty was accepted under the rationale of North Carolina v. Alford.[4].

---

1. It was later determined in the presentence report that the Appellant had attended up to the third grade in Puerto Rico, and was, in fact, illiterate in both English and Spanish.
2. Page 11 of the plea minutes.
3. Page 4 through 8 of the plea minutes, noting page 7.
4. Page 27 of the plea minutes.

Julio Gonzalez repeatedly stated that the Government's informer, an actual participant in the transactions allegedly involved the Appellant, Edwin Gonzalez, was accusing him of crimes of which he was not guilty and was trying to frame him.[5]

At page 25 of the plea minutes, Julio Gonzalez, indicates that it was his understanding that unless he and his brothers plead guilty that his brothers would receive sentences of twenty or twenty-five years imprisonment after trial if they were convicted.

About two weeks after the pleas were accepted, the Appellant came to the present defense counsel regarding the possibility of a plea of withdrawal on behalf of both Julio and the Appellant.

Counsel's retention in the case was dependent upon the assignment of cash bails previously posted on behalf of Ramon Gonzalez and the Appellant. The surety of Ramon's bail which originally was to have been used as the source to pay the retainer was unavailable. (During the interim, William Gonzalez, the surety, obtained the services of another attorney on behalf of Julio and Ramon.) Subsequently, the Appellant's common-law wife, the surety on the Appellant's bail, made an assignment of that bail and counsel entered into the case and conferred with prior counsel.

On December 2, 1975, counsel, upon being advised by the Probation Officer that the presentence report was almost completed and would be almost immediately forwarded to the sentencing Court, sent a letter to the Court and U.S. Attorney re-

---

5. Pages 19,20,25 and 26 of the plea minutes.

questing the withdrawal of the Appellant's plea and stating the grounds for such application.[6] (See minutes of Appellant's sentencing at page 5.)

The sentencing court showed an obvious predisposition to denial of the application to withdraw the guilty plea. (Page 3, lines 10 and 11: page 7, lines 17 and 18: and page 8, lines 15 through 17, of the Appellant's sentencing minutes.)

The Appellant's claim for withdrawal of the guilty plea was premised upon two separate grounds. Firstly, that the Government's informer, (co-operating individual) Enrique Bermudez, against whom were pending four separate narcotics charges, was the source of the contraband which the Appellant was charged with possessing and distributing. Secondly, that the Appellant originally plead guilty not because of his belief in his own legal guilt, but because of the representation made to him by prior counsel that if he and his brothers continued with the trial, and were convicted, that they would all receive sentences of at least twenty to twenty-five years imprisonment.

As to the first ground, the Appellant stated that Mr. Bermudez (the informer) gave drugs to him to be sold as though they were the Appellant's drugs and that the Appellant was to receive the sum of $100.00 for performing this service. (Page 8, lines 9 through 14 of Appellant's sentencing minutes.)

Despite this argument, the sentencing court denied the

---

6. At the time of sentence, the trial court could not locate its copy of the application, although the U.S. Attorney had received its copy and handed same to the sentencing court. It must be emphasized that the request to withdraw the guilty plea was no last minute ploy or device and was made in good faith.

motion to withdraw the plea without affording the Appellant a hearing on the issue.[7]

(B) THE SENTENCE

Prior to the imposition of sentence, the sentencing court permitted counsel to examine the presentence investigation report prepared by the probation officer. The salient facts elicited from the report are:

> 1) that the Appellant's contention as to the manner in which Bermudez participated in the transactions were expressed to the probation officer;
>
> 2) that the Appellant had not even completed the third grade in Puerto Rico;
>
> 3) that the Appellant was a functional illiterate in both English and Spanish; and
>
> 4) that the Appellant's prior criminal history was of a minor nature.

Indeed, the sentencing court noted that the Appellant's state court convictions[8] were not serious.

The Appellant, although not legally, has maintained an intact family life with his common-law wife and has cared for her three children as well as the child who is the progeny of their relationship of seven years duration. The Appellant was, and continues to be, employed in a grocery earning $70.00 per week and is supplemented by assistance from the Department of Social Services.

After the colloquy between counsel and the sentencing court, the court imposed a sentence of four years imprisonment

---

7. At page 10, the sentencing court used the term "another hearing, despite the fact that no such prior hearing had been conducted.

plus five years of special parole.

At this point, the Appellant interjected,[9] in Spanish, that prior counsel made him guilty and that prior counsel took his fee, promised to get him out and then made him plead guilty anyway.

Julio Gonzalez was sentenced to a year and a day with credit for time already served. Ramon Gonzalez, who was allegedly involved in all three transactions was committed for three months for study and report pursuant to Section 4208(b) of Title 18 to determine his mental capacity prior to final sentence.[10]

---

8. Possession of stolen property involved an automobile on which Appellant received probation, which was terminated favorably, and another minor case where Appellant paid a fine.
9. Page 18 through 20 of the Appellant's sentencing minutes.
10. See sentencing minutes of Ramon Gonzalez at page 7.

POINT I

THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE WITHDRAWAL OF DEFENDANT'S GUILTY PLEA PRIOR TO SENTENCE WITHOUT AFFORDING THE DEFENDANT A HEARING ON THE ISSUES RAISED IN THE APPLICATION.

Although there is no absolute or constitutional right by a defendant to withdraw a previously entered guilty plea, it is the general and prevalent rule that such an application should be entertained and leave to withdraw freely granted prior to the imposition of sentence. United States v. Thomas, 415 F.2d 1216 (C.A. Cal. 1969); Spradley v. United States, 421 F.2d 1043 (C.A. Fla. 1970). In such instances it has been held that "great liberality should be allowed in granting request of the defendant for a change of a plea of guilty, and any doubts should be resolved in favor of withdrawal of the plea." Jones v. Eyman, 353 F.2d 528 (C.A. Ariz. 1965)

In the instant case, the Appellant sought to withdraw his guilty plea well in advance of the date set for sentencing. (See p. 5 of sentencing minutes.) Unlike a motion to vacate under 28 U.S.C. 2255, a motion to withdraw a guilty plea is not subject to the test that the defendant show "manifest injustice" if the plea is not withdrawn.

The grounds stated on the motion to withdraw the guilty plea were the existence of the defense of entrapment or prosecutorial misconduct and the representations made to each of the defendants that unless they plead guilty that each of them would

receive twenty to twenty-five years in jail. The plea minutes of the defendants abound with allusions that the pleas were tendered primarily to avoid serious consequences to Julio Gonzalez, one of the defendants, from whom the trial court reluctantly accepted a guilty plea after an arduous and detailed allocution.

Julio Gonzalez's plea taking was in marked contrast with the almost mechanical and methodistic allocution of the Appellant, Edwin Gonzalez. In addition, the Appellant's allocution was not in conformity with the provisions of Rule 11 of Title 18 of the U.S.C. in two respects. Firstly, the Appellant was not advised that he had the right to confront and cross-examine witnesses against him and the right not to be compelled to incriminate himself.[11.] Secondly, and more importantly, the trial court did not make a sufficient inquiry to ascertain a factual basis for the plea.[12.]

The court's questioning of the Appellant with respect to the facts of the case consisted solely of the following two questions and answers:

> "Q: Now, are you pleading guilty because you did in fact do what is charged?
>
> A: Yes.
>
> Q: Did you sell two ounces of cocaine to Mr. Blackburn in March of this year?
>
> A: Yes."

The trial court did not attempt to elicit from the Appellant any independent information which indicated the Appel-

---

11. See Rule 11, subdivision (c) subdivision (3).

12. See Rule 11, subdivision (f).

lant's own knowledge of the facts. The questioning was likewise devoid of any reference as to whether the Appellant ever possessed the controlled substances alleged.[13]

Under the circumstances of the case, the grounds raised for withdrawal of the guilty plea warranted, at the very least, a hearing of the issues. In United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), it was held where a government informer, even without the knowledge of government agents, supplies the contraband which is ultimately sold to the government agents such conduct constitutes entrapment as a matter of law. (See, United States v. Dillet, 265 F. Supp. 980 (S.D.N.Y. 1966); United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959) (See, United States v. West, 511 F.2d 1083 (3rd Cir. 1975)

In the instant case, the Appellant, through his motion to withdraw his guilty plea, asserted this type of "entrapment" or governmental misconduct. In his interview with the probation officer, the Appellant also made such assertions and this fact was reflected in the presentence investigation report. Indeed, the Appellant had consistently made this claim even with prior counsel.

In Russell v. United States, ---U.S. ---, 41 L.W. 4535 (1973) the Supreme Court of the United States sustained the conviction of Russell, reversing the Court of Appeals because there was substantial evidence that the defendant in that case had been involved in making drugs both before and after

---

13. This is in marked contrast with the questioning of Ramon Gonzalez (page 7, line 8 of the plea minutes) and bears direct relationship as to the existence of a factual basis for acceptance of a plea to Count One of the Indictment.

the agent's involvement and, as such, Russell was not otherwise innocent and in view of Russell's own statement "that he may have harbored a predisposition to commit the charged offenses".

In Russell, the Supreme Court acknowledges two related theories, namely, entrapment regardless of predisposition, United States v. Bueno, 447 F.2d 903 (C.A. 5th Cir. 1971), and a non-entrapment rationale where a government investigator or informer became so enmeshed in the criminal activity that the prosecution of the defendants was held to be repugnant to the American criminal justice system. Greene v. United States, 454 F.2d 783 (9th Cir. 1971) The Supreme Court concludes that these two rationales constitute the same defense and are premised on the fundamental concepts of due process and the reluctance of the judiciary to countenance "overzealous law enforcement". (See, Sherman v. United States, 356 U.S. 369, 381 (1958), Frankfurter, J. concurring)

In the case at bar, it was highly unlikely that the Government could establish any continuing or ongoing activity on the part of the Appellant with respect to hard drug trafficking which antedated the involvement of the government's informer, Enrique Bermudez. Nor would the Government be able to show any subsequent involvement by the Appellant with narcotics.

What then brought about the Appellant's fateful decision to plead guilty? The protestations of Ramon Gonzalez and Julio Gonzalez during the taking of their pleas clearly indicate that the pleas entered into as a "package deal" were

motivated by a desire to mitigate Julio's circumstances rather than an exclamation of the Appellant's legal guilt.

It is true that the Appellant did not assert a total lack of participation or even the lack of factual guilt. However, this fact merely highlights the bonafideness of his claim that he was cowed and duped by Bermudez, who was then facing several drug charges, and was "making" cases for the Government in the expectation of receiving lenient treatment. If anyone had a motive to employ a lie or deceit that person was the "cooperating individual", Enrique Bermudez.

Underlying this entire discussion is one uncontrovertible fact that the Appellant is an uneducated man, illiterate in both English and Spanish, with a marginal understanding of those languages. Such a person is highly susceptible to the suggestion of prior counsel that a plea of guilty on his part (which was an essential ingredient to the Government's acceptance of a plea to less than all counts by Julio Gonzalez) was the only way to "save" his brother.

The sentencing minutes, starting at page 18, where the Appellant engaged in colloquy with the trial court is most revealing. The Appellant explained that he paid prior counsel $2,000.00, which represented the savings of many years, on the promise that the lawyer would get him off. The court's response was that "That is not a high fee in a long felony trial", as if to explain that such a fee is not unreasonable; hence that the Appellant was not being taken advantage of. In fact, the rather

low fee might explain why a lawyer would seek to induce his client to plead guilty rather than participate in a long, uneconomical trial.

The trial court's reasoning for denying the motion to withdraw the guilty plea was that it would require the holding of a hearing on the issue and that such a "hearing" could have been had during the trial. If such reasoning were applied in every case, then no hearings on the issue would ever be conducted because, presumably, the defendant could have raised the issue earlier in time than the time of the acceptance of his plea.

In the light of all the circumstances in this case, it cannot be stated as a matter of law that the Appellant's guilty plea was the product of an informed, knowing, intelligent and voluntary decision free from influences calculated to induce such a plea. At the very least, a hearing on the issue should be directed.

POINT II

THE SENTENCING COURT IMPOSED UPON THE APPELLANT A SENTENCE WHICH IS EXCESSIVE IN VIEW OF SENTENCES IMPOSED ON OTHER DEFENDANTS FOR SAME OR SIMILAR OFFENSES, AND, IN LIGHT OF THE APPELLANT'S BACKGROUND AND IN THE INTEREST OF JUSTICE, THE SENTENCE SHOULD BE REDUCED.

Although the general rule has been that a court of appeals may not reverse or tamper with a sentence that is within legal limits, that rule is not without exceptions. In Dorzynski v. United States, 418 U.S. 424, 41 L.ed.2d 855 (1974), the Supreme Court while restating this rule acknowledged an exception where review is permitted "when sentencing discretion is not exercised at all". Such mechanistic sentencing does not merely involve those situations where maximum penalties are imposed. A rigid policy involving even less than the maximum may be objectionable where such practice ignores individual differences between defendants. United States v. Foss, 501 F.2d 522 (1st Cir. 1974); United States v. Baker, 487 F.2d 360 (1973).

The Supreme Court in Williams v. New York, 337 U.S. 241, 93L.ed. 1337 (1949) said:

> "The punishment should fit the offender and not merely the crime.
> ...The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."

In the instant case, the background, home life and work history of the Appellant was brought out in detail at the time of sentencing. In considering the Appellant's prior history

with the law, the sentencing court conceded that it was not of a serious nature. Nevertheless, the court imposed a sentence which, in many respects, is equal to that imposed upon major narcotics violators. (See, United States v. Bertolotti, --- F.2d ---(2nd Cir. 1975 75-1077), which was reversed on the multiple v. single conspiracy "spill over" theory where the defendants, with exception of one ring leader, each received five years imprisonment with three years special parole.)

Given the circumstances of this case, the interest of justice requires that a downward modification of the sentence imposed is appropriate.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT BELOW SHOULD BE REVERSED, AND THE APPELLANT BE PERMITTED TO WITHDRAW HIS PLEA OR, IN THE ALTERNATIVE, THAT A HEARING BE HELD. IN THE INTEREST OF JUSTICE, THE SENTENCE IMPOSED SHOULD BE REDUCED UNDER THE CIRCUMSTANCES IN THIS CASE.

Respectfully Submitted,

Arlen S. Yalkut

ARLEN S. YALKUT of
BLEIFER & YALKUT
Attorneys for Appellant,
EDWIN GONZALEZ
Office & P.O. Address
12 Spring Brook Road
Spring Valley, New York 10977
(914)425-0300

Of Counsel,

ARLEN S. YALKUT, ESQ.

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

NEW YORK S UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

- against -

EDWIN GONZALEZ,
Appellant,
and
JULIO GONZALEZ AND RAMON GONZALEZ,
Defendants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 27th *day of* Febrary *1976 at* 225 Cadman Plaza, Brooklyn, New York

deponent served the annexed Brief ~~Appendix~~ *upon* DAIVD TRAGER- U.S. ATTNY_ East Dist.

~~Attorney~~ *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 27th *day of* Febrary *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

victor ortega

VICTOR ORTEGA